Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

(21)

No. 03-388

IN THE

Supreme Court of the United States

DENNIS BATES; JIMMY BURSON; BENNY JUDAH, doing business as CLEARWATER FARMS; TOMMY COLEMAN; RICHARD COX; WAYNE DAVIS; NEIL FRIESSEN; JAKE FORESE; THOMAS FUSTON; ARTHUR GALVAN, doing business as G-5 PARTNERSHIP; GREG HUGHES; SANDRA and KARL DON HUGHES, doing business as JH CATTLE CO.; RUDY KLASSEN; RONNIE LOVE; KEVIN MATHIS; BRAD PALMER; KIRK PARRISH, doing business as K-L FARMS; JERRY PARRISH; JoEVELYN PATTERSON and DONALD GRUBEN; STACEY PRICE; BENNY JUDAH, doing business as PROGRESSIVE FARMS; MORRIS RUSHING, doing business as PEA-COT FARMS; BILLY SHANNON, FLOYD STOKES; CRAIG WEST; FRENCHIE LEE WHEELER,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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STATEMENT PURSUANT TO RULE 29.6

Dow AgroSciences LLC is a wholly owned subsidiary of The Dow Chemical Company.

Petitioners' response to the Brief for the United States as *Amicus Curiae*, their Supplemental Brief in Support of Petition for a Writ of *Certiorari* ("Supplemental Brief"), simply ignores the United States' fundamental and primary position; that is, 7 U.S.C. § 136v(b), the express preemption clause in the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, operates automatically and unconditionally, making no exceptions dependent upon the timing or intensity of the Environmental Protection Agency's ("EPA") scrutiny of product efficacy or crop safety data. *See Amicus* Brief at 10-11 ("Under Section 136v(b)'s plain text, EPA's decision not to require manufacturers to submit efficacy information as part of the registration process is not relevant to the scope of FIFRA's express preemption."); *id.* at 12 ("Section 136v(b)'s unqualified text does not exempt from preemption state-law damages actions based on product efficacy."); *id.* at 13 ("EPA's general practice of not independently evaluating product efficacy data is irrelevant to Section 136v(b)'s express preemption inquiry."); *id.* at 14 ("Section 136v(b)'s proscription continues to prohibit a State from requiring the registrant to change the directions for use or to include additional or different product efficacy statements on the label, regardless of whether or not EPA evaluates product efficacy claims in the registration process."); *id.* at 17 n.9 ("Under a proper reading of Section 136v(b), the question whether EPA received or reviewed efficacy data is irrelevant to the express preemption inquiry.").

Further, Petitioners' Supplemental Brief mischaracterizes 7 U.S.C. § 136a(c)(10). Contrary to Petitioners' suggestion, Section 136a(c)(10) is not a provision under which product registrations issue. Rather, it authorizes instead a process for expedited review of certain registration applications,

according priority consideration to applications submitted under EPA's Reduced Risk Initiative. *See Amicus* Brief at 16 n.5 (describing Section 136a(c)(10)'s expedited review procedures).

Petitioners state they "do not believe Strongarm was approved under the [Reduced Risk Initiative]." Supplemental Brief at 1. Registrations, however, do not issue under Section 136a(c)(10) in the first place. Indeed, Respondents already informed this Court that Strongarm's registration issued under Section 136a(c)(7)(A):

> Because Strongarm's application for registration was submitted under the 1996 amendments to FIFRA, specifically 7 U.S.C. § 136a(c)(10) (authorizing the Reduced Risk Initiative implemented by the EPA through Pesticide Regulation Notice 97-3 (Sept. 4, 1997)), Dow AgroSciences submitted a comprehensive body of data on Strongarm's efficacy in controlling broadleaf weeds in peanuts and its safety for that use.
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> * * *
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> Strongarm's federal registration ultimately issued on March 8, 2000, pursuant to 7 U.S.C. § 136a(c)(7)(A).

Brief in Opposition at 2 (footnote omitted).

Petitioners also suggest that Respondent did not submit product efficacy and crop safety data to EPA during initial registration process for Strongarm, stating that "Petitioners

believe [the United States'] assumption about the data Respondent actually submitted to the EPA is unsupported by the record." Supplemental Brief at 2. The record, however, clearly reflects that Respondent did in fact submit this data to EPA. *See* 6R. 1259-62. Moreover, Petitioners ignore that EPA is a signatory to the *Amicus* Brief. EPA was and is in the best position to confirm that product efficacy and crop safety data were submitted during the Strongarm registration process, and if such data had not been submitted, EPA would be best positioned to challenge that fact and it did not. *See Amicus* Brief at 16.

Lastly, Petitioners' suggestion on this point, as the United States explained, is irrelevant to FIFRA's express preemptive effect. Thus, any debate over Respondent's data submissions to EPA ends before it begins.

CONCLUSION

For the reasons explained in Respondent's Opposition Brief, and for the reasons explained by the United States in its *Amicus* Brief, the Petition should be denied.

Respectfully submitted,

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